IN THE

SUPREME COURT OF THE UNITED STATES

June Term, 1958.

No. 207

LEE ROY GRANT, ... Petitioner,

versus

UNITED STATES OF AMERICA, . . Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~SEVENTH~~ CIRCUIT.

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LEE ROY GRANT, - - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that the writ of certiorari issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on the 29th day of May, 1958.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the above judgment is printed in Appendix A, page 15.

The judgment of the United States District Court for the Western District of Kentucky, Owensboro Division was entered on the 10th day of September, 1957 and appears in Appendix D, page 23.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on the 29th day of May, 1958. Petitioner's petition for rehearing was timely filed as approved by the rules of the United States Court of Appeals for the Sixth Circuit, to-wit: June 16, 1958, and petitioner's petition for rehearing was denied on the 26th day of June, 1958.

This petitioner filed his application for stay of mandate pending final determination of this cause by the Supreme Court of the United States upon his application for writ of certiorari; petitioner further says that said application for stay of mandate pending final determination of this court by the Supreme Court of the United States upon his application on writ of certiorari was granted on the 21st day of July, 1958 in accordance with rule 30 of the United States Court of Appeals for the Sixth Circuit.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254

Jurisdiction was conferred upon the United States Court of Appeals for the Seventh Circuit by 28 U.S.C. 1291.

QUESTIONS PRESENTED.

I. The conviction of the petitioner violated his constitutional rights as protected by the Fifth Amendment to the Constitution of the United States of America in this: "No person * * * shall be deprived of life, liberty or property without due process of law."

II. The petitioner not convicted by substantial evidence.

The petitioner was not convicted by substantial evidence. The substantial rights of the petitioner were materially affected by the admissions under which petitioner's objections of testimony of other criminal offenses not included in the several counts of indictment and the evidence considered most favorable to the government was not sufficient to support conviction in that it consisted solely of the testimony of a self-confessed leader of a vast stolen car ring.

III. The petitioner did not receive a fair trial according to the standards and principles of our great nation as heretofore established by the rules of this court.

IV. The substantial rights of the petitioner have been materially effected by the lower court's erring in:

(1) Admitting testimony of other criminal offenses not germane to the stipulation.

(2) Improperly instructing the jury as to the nature and effect of the stipulation.

(3) Failing to instruct the jury concerning the consideration to be given testimony of other criminal offenses.

(4) Improperly instructing the jury as to the consideration to be given testimony of character witnesses.

(5) Improperly instructing the jury as to the weight and credibility to be given to the testimony of a self-confessed alleged co-respondent.

(6) Improperly instructing the jury as to the weight and credibility to be given the testimony of the defendant.

(7) Refusing to sustain petitioner's motion for a new trial.

THE STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix B, page —, and are as follows, to-wit:

18 U.S.C. Section 2313.

Constitution of the United States,
Fifth Amendment.

28 U.S.C. Section 1254.

28 U.S.C. Section 1291.

CONCISE STATEMENT OF CASE CONTAINING FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

The jurisdiction of the court of the first instance arose from the hereinafter referred to indictment based upon 18 U.S.C. Section 2313.

The petitioner was originally charged in six counts of an indictment (Appendix C, page —) of reportedly receiving and concealing stolen automobiles which were moving in interstate commerce.

The petitioner was first tried in February of 1957 and resulted in the jury being unable to agree upon a verdict, whereupon the case was continued until the September Term in 1957, at which time the petitioner was again tried and the jury found the defendant not guilty of counts one, two and three, but guilty of counts four, five and six of said indictment. By virtue of a stipulation, the case was tried only as to issue of knowledge on the part of the petitioner. Upon the findings of the jury, a trial court entered a judgment adjudging the defendant guilty of counts four, five and six of said indictment and sentencing him for a period of two years on each count, said sentences to run concurrently.

The Government's case was based upon the testimony of one Rufus Owen Hesson (App., 4a-20a), who testified in general that he and one Orrin Wright, had operated a stolen car ring for about a year before the first date of this indictment. That they had stolen ten or fifteen cars before meeting Grant. That in the latter

part of 1953, he and Wright went to Madisonville and while he sat in the car, out of hearing distance, Wright engaged Grant in a conversation. That he heard nothing and knew nothing of the subject of this conversation (App. 19a). That thereafter he began delivering cars to Madisonville, parking them behind Grant's motel, and later collecting his share from Wright. That he did all this under the direction of Orrin Wright. By his admission, he was an accomplice and a convicted felon. Later he specifically testified as to each car alleged in the indictment. Orrin Wright was at the time of the trial in a federal penal institution (App. p. 14b). But did not appear and testify.

The defense was based upon the testimony of the appellant, Lee Roy Grant, who testified in general (App. 20a-31a), that he operated a used car lot in Madisonville. That he frequently purchased cars from dealers from various places and that he sold said cars to persons living in and around Madisonville, Kentucky. That he did not know Rufus Owen Hesson, and that he had never seen him prior to the first trial of this case. That he had no deal with Orrin Wright concerning automobiles, legitimate or stolen. That he never knowingly received any stolen car, and never attempted to conceal the identity of any car.

During the trial over the objections of the petitioner, the government elicited testimony from its witnesses to the affect that certain other cars, not named in the indictment, had been stolen and were delivered to the petitioner's place of business.

REASONS FOR GRANTING WRIT.

I. THE PETITIONER WAS NOT GIVEN A FAIR AND IMPARTIAL TRIAL IN THAT THE TRIAL COURT ADMITTED TESTIMONY OF OTHER OFFENSES NOT INCLUDED IN THE INDICTMENT. The Government elicited testimony from the witness Rufus Owen Hesson concerning a 1953 Cadillac, which testimony was objected to by the petitioner (App., 3a-7a, 9a, 14a-16a). This evidence was to the affect that the witness, Rufus Owen Hesson, had stolen the car and put it in the petitioner's garage; that the petitioner told him to take it back because the witness, Hesson, had not changed one of the numbers on the car (App., p. 21b).

The appellant submits that this evidence was only submitted for the purpose of prejudicing him and in that connection wishes to call to the attention of the court to the parts of the proceeding and the trial. First, the Cadillac transaction was refererd to by the District Attorney in his opening statement (App., p. 14b). Second, Marvin T. Bell, special agent for the Federal Bureau of Investigation, a witness for the prosecution without then being responsive to the questions asked him, blurted out "In addition to those six he sold several others that were also stolen, a total of twelve" (App., p. 79b). Then again later he blurted out "and I might add, Mr. Bratcher, that there were three or four other cars interspersed with these that he is charged with . . ." (App., p. 82b).

The petitioner has contended and the Government not denied that:

> "It is a well established principal of law that upon the trial of an indictment charging a specific crime against the accused, it is not competent for the prosecution to put in evidence, proof tending solely to show that the defendant had been guilty of other similar offenses." *Laughlin* v. *U. S.*, 92 F. 2d 506.
>
> "It is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself." *Niederluecke, et al.* v. *U. S.*, 21 F. 2d 511, *Boyd* v. *U. S.*, 142 U. S. 450, 12 St. Ct. 292, 35 L. Ed. 1077.

II. Substantial rights of petitioner affected.

(a) Petitioner contends that his conviction was not supported by competent and or substantial evidence, and, as a result thereby, did not receive a *fair trial* according to the standards and principles of our great nation as heretofore established by the rules of this court.

The only conflict in the evidence bearing directly upon the issue presented to the court was contained in the evidence of two witnesses, the first being for the prosecution by the witness, Rufus Owen Hesson, who was a self-confessed leader of a vast stolen car ring and the other was the defendant who denied his charges.

As to count four, Hesson testified that between May 19, 1955 and August 16, 1955, he took a 1955 Chevrolet sedan from Evansville to Madisonville and parked it behind a motel and saw Skinner Wright later on, when he collected the money for the automobile (App., p. 26b). He did not testify that he had any personal contact or conversation with the appellant concerning this transaction.

As to count five, Hesson testified that in January, 1954, he took a 1953 Chevrolet from Evansville to Madisonville; that he had not changed the engine; that he asked the appellant where he could work on the car and the appellant took him to a place and left him, where Hesson changed the car and took it back to the appellant's car lot, gave him the title to the '53 Chevrolet and paid him $350 or $400 (App., pp. 26b, 27b). Hesson testified that he used the garage to change the number on a '53 Chevrolet; he did not testify that he told the appellant that the automobile was stolen or that he told the appellant that he was going to change the numbers on the automobile.

As to count six, Hesson testified that in March of 1954 he took a 1953 Chevrolet from Indianapolis to Madisonville and he either left it on the car lot or behind the motel, he wasn't sure (App., p. 29b) and that he was paid for this car by Skinner Wright (App., pp. 29b, 30b). He did not testify that he had any personal contact or conversation with the appellant concerning this transaction.

Much of the evidence that Hesson testified to was obtained through a man by the name of Skinner Wright

who was by the admission of the District Attorney in a federal institution at the time of the trial (App., p. 14b). Thus, we have the testimony of Hesson which does not directly bear upon the relationship of the appellant to these transactions. The denial of the appellant and the absence of a witness who was at the time in the custody of the federal authorities.

Thus, the appellant believes that the verdict of the jury can in no way be consistent with the evidence given them.

(b) The court improperly instructed the jury as to the nature and effect of the stipulation. A stipulation was entered into to the effect that the automobiles alleged in the indictment were stolen, were in interstate commerce, and were received by the petitioner, leaving for the jury to decide the issue of knowledge and concealment on the part of the petitioner. In instructing the jury the court discussed at large, the stipulation entered into and in such a manner as to leave the impression that the defendant was three-fourths guilty by admission. The petitioner's disposition to co-operate should not be taken advantage of by having it submitted to the jury in such a manner as to make it susceptible to misinterpretation by the jury to his prejudice. This instruction unduly emphasized the stipulation and distorted its meaning.

(c) The court failed to instruct the jury concerning consideration to be given testimony of other criminal offenses. Over the appellant's objection, the court admitted testimony of other criminal offenses. The testimony having been admitted; the court failed

to instruct the jury as to its affect, that is that they were not to convict the defendant on the grounds that he may have committed other criminal offenses and should only consider such testimony as it relates to the crimes he was charged with. *Boyd* v. *U. S.*, 142 U. S. 450, 12 S. Ct. 292, 35, L. Ed. 1077; *Witters* v. *U. S.*, 106 F. 2d 837.

(d) The court improperly instructed the jury as to the consideration the jury should give to the testimony of character witnesses (App., p. 138b). Instruction used by the court is similar to the one condemned by the court in the case of *Hayes* v. *U. S.*, 227 F. 2d 540, 545:

> "It does not tell the jury that the character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing."

The instruction given by the court gave the jury the opposite meaning when the court said:

> "It does not necessarily follow, however, that because a man has a reputation for honesty and good character that he has not committed the acts with which he is charged" (App., p. 138b).

This instruction nullified any affect the testimony of the character witnesses may have had and therefore, the court erred only in not properly instructing the jury but also in instructing them erroneously.

(e) The court failed to properly instruct the jury as to the weight and credibility it should give to the testimony of Rufus Owen Hesson. The jury was told that Hesson had

"Admitted and testified that he stole these cars and therefore, since whoever commits the offense against the United States or aids or abets or counsels, commands, induces, or procures its commission is a principal and is subject upon commission to punishment just the same as if he had committed the act himself" (App., p. 138b).

But the court failed to caution the jury that such testimony "Must be carefully scrutinized, weighed with great caution and that too much reliance should not be placed upon it unless corroborated." *Johns* v. *U. S.*, 227 F. 2d 374, 375. To the contrary, the jury was told:

"Hesson is an accomplice of this defendant from his testimony, if you believe it, and if you do find that the witness Hesson took part in the commission of the unlawful acts for which this defendant is charged, his testimony is to be received by you with caution and you should not accept it unless so far harmonized with the other testimony in the case as to leave in your minds no reasonable doubt of its truth" (App., p. 139b).

This instruction had the same affect as the one given in the case of the *United States* v. *Balodinas*, 177 F. 2d 485, 487:

"If the jury accepted the court's theory that these witnesses were accomplices and had openly admitted that they were law violators and that they had a part in the commission of the crime, it is difficult to discern how they could have avoided the conclusion that the defendant was also guilty. The charge presupposes that the crime charged had been committed by the defendant and that the wit-

nesses had openly admitted their part in its commission. Ordinarily in a criminal trial there is no question but that a crime has been committed; the question at issue is whether it was committed by the defendant. Here, we have the reverse of that situation. The question for determination was whether a crime had been committed. The effect of this instruction was to resolve that question in the affirmative. With such a resolution there was nothing for the jury to do but to find the defendant guilty."

(f) The court's failure to instruct on the legal principles favorable to the defendant was aggravated by sharp and pointed instructions favorable to the prosecution. This is illustrated by the final paragraph of the court's instructions wherein he stated "The credibility of the witnesess and of the defendant is a factual issue, and in determining the credibility of the witness you shall consider among other things, the interest that the witness or the defendant might have in the outcome of this case" (p. 10 of the appellant's brief).

CONCLUSION.

In conclusion, the petitioner earnestly prays that a writ of certiorari issue.

Respectfully submitted,

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